STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0719

Aspenwood Condominium of Duluth, Inc.,
Appellant,

vs.

PMA Companies, member of the Old Republic Insurance Group,
Respondent.

Filed February 14, 2022
Affirmed
Florey, Judge

St. Louis County District Court
File No. 69DU-CV-20-1611

Alexander M. Jadin, Timothy D. Johnson, Ross M. Hussey, John C. Wittmer, Smith Jadin Johnson, P.L.L.C., Bloomington, Minnesota (for appellant)

Christopher L. Goodman, Thompson, Coe, Cousins & Irons, L.L.P., St. Paul, Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Florey, Judge; and Klaphake, Judge.*

NONPRECEDENTIAL OPINION

FLOREY, Judge

Appellant-insured challenges the district court's dismissal under Minn. R. Civ. P. 12.03 of its breach-of-contract and declaratory-judgment claims against respondent-

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

insurer, arguing that the district court erred in dismissing the action based on appellant's untimely service because (1) service was rendered impracticable by the closure of respondent's office; (2) the principles of equitable tolling apply; and (3) equitable estoppel applies. We affirm.

FACTS

Appellant Aspenwood Condominium of Duluth, Inc. (the Association), purchased a commercial insurance policy (the Policy) from respondent PMA Companies (PMA) that was in effect from March 1, 2018, through March 1, 2019.[1] Among other things, the Policy insured the Association's property (the Property) against wind and hail. The Policy, in relevant part, provides:

> No one may bring a legal action against [PMA] under this policy unless:
> a. There has been full compliance with all of the terms of this policy; and
> b. The action is brought within two years after the date on which the direct physical loss or damage occurred.

The Association first discovered wind and hail damage to its property in August 2020. Shortly after, a public insurance adjustor inspected the property and determined the damage occurred on August 31, 2018. The Association reported a claim for the hail damage to PMA on August 21, 2020. Then, on August 31, 2020, exactly two years after the date the hail damage occurred, the Association attempted personal service on PMA

[1] The Association is a Minnesota nonprofit common interest ownership community. PMA is a foreign insurance company licensed and authorized to sell insurance and transact business in Minnesota with a principal place of business and registered office at 380 Sentry Parkway, Blue Bell, Pennsylvania 19422.

during normal business hours at its corporate headquarters in Blue Bell, Pennsylvania, through a nationwide process server. Personal service was unsuccessful because PMA's registered office was closed, and no one was present to receive service. The parties agree that the closure of PMA's office was likely due to the COVID-19 pandemic.

On September 1, 2020, two years and one day after the date of loss, the Association successfully served the Summons and Complaint by sending a copy of the process to the Minnesota Commissioner of Commerce via certified mail pursuant to Minn. Stat. § 45.028 (2020). The parties agree that the Association did not successfully achieve timely service and therefore failed to commence suit within the Policy's two-year limitation.

PMA moved for judgment on the pleadings based on the Association's untimely service. In opposition, the Association raised three equitable arguments: (1) the doctrine of impossibility/impracticability; (2) equitable tolling; and (3) equitable estoppel. The district court granted PMA's motion for judgment on the pleadings and dismissed the Association's claims with prejudice.

This appeal follows.

DECISION

On appeal from a grant of a motion for judgment on the pleadings under Minn. R. Civ. P. 12.03, this court accepts the factual allegations in the complaint as true and construes those allegations in the light most favorable to the non-moving party. *Burt v. Rackner, Inc.*, 902 N.W.2d 448, 451 (Minn. 2017). In determining whether a district court properly granted judgment on the pleadings, this court reviews de novo whether the complaint presents a legally sufficient claim for relief. *Id.* Equitable determinations are

reviewed for an abuse of discretion. *City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 24 (Minn. 2011).

For the first time on appeal, the Association argues that its time to commence suit under the Policy was extended by the legislature's suspension of statutory deadlines in response to the COVID-19 pandemic and that the Policy's two-year limitation is unreasonable under the unique circumstances of this case. Because this court generally does not review issues not presented to and considered by the district court, we decline to reach this issue.[2] *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Here, the parties agree that service was untimely and that the only issues raised to the district court were the equitable issues of impracticability, equitable tolling, and equitable estoppel.

Impracticability

The Association argues that the closure of PMA's office rendered personal service impracticable.[3] The district court rejected the Association's argument because "[s]ervice

[2] Even if the Association's argument was within the scope of this court's review, the legislature's suspension of statutory deadlines has no effect on the limitation period at issue here, which is entirely contractual in nature. *See* 2020 Minn. Laws. ch. 74, art. 1 § 16, at 66. ("The running of deadlines imposed by statutes governing proceedings in the district and appellate courts, including any statutes of limitations or other time periods prescribed by statute, is suspended.").

[3] The Association also argues that the expenses and burdens associated with service via the Commissioner rendered substitute service impracticable. However, because the Association failed to raise the impracticability of substitute service in the district court, it is forfeited. *See Thiele*, 425 N.W.2d at 582. Even if the argument was within the scope of this court's review, it would fail because the "burdens" associated with substitute service are minimal compared to the risk and expense associated with attempting personal service under the facts of this case.

on the Commissioner of Commerce via certified mail was always possible" and was accomplished the following day.

Minnesota law recognizes the defense of impossibility, or impracticability, which can excuse performance under the terms of a contract when:

> due to the existence of a fact or circumstance of which the promisor at the time of the making of the contract neither knew nor had reason to know, performance becomes impossible, or becomes impracticable in the sense that performance would cast upon the promisor an excessive or unreasonably burdensome hardship, loss, expense, or injury.

Powers v. Siats, 70 N.W.2d 344, 348 (Minn. 1955) (footnote omitted). Difficulty of performance alone will not ordinarily excuse a party from his contractual obligations, "but where a great increase in expense or difficulty is caused by a circumstance not only unanticipated but inconsistent with the facts which the parties obviously assumed as likely to continue, the basic reason for excusing the promisor from liability may be present." *Id.* at 349. Impossibility will not excuse performance when the "impossibility or impracticability of performance is wholly attributable to the subjective inability of the promisor." *Id.* at 348. In *Powers*, the Minnesota Supreme Court stated:

> A promisor who, after having assumed a contractual duty without then knowing or having reason to know of a fact which makes performance impossible or impracticable, subsequently acquires knowledge of such fact in time to avoid the dire consequences of nonperformance, but who despite such knowledge proceeds without taking reasonably prudent steps to avoid such consequences, cannot thereafter be heard to assert the defense of impossibility of performance. This equitable rule . . . is sometimes referred to as an assumption of risk.

70 N.W.2d at 349.

Here, the Association failed to take "reasonably prudent steps" to avoid the consequences of ineffective and untimely service. The Association knew of the COVID-19 pandemic and its ramifications, yet it elected to personally serve an out-of-state corporation on the last day of the contractual period without even attempting to confirm that PMA's office was open. Had the Association called PMA to inquire as to whether the office would be open, it could have timely commenced this action by serving the Commissioner via certified mail. Moreover, had the Association taken advantage of the alternative method of service via the Commissioner, it would have eliminated the risk of ineffective service entirely. Accordingly, the Association assumed the calculated risk associated with attempting personal service under these circumstances.

Because the Association failed to take reasonably prudent steps to ensure timely service, and thus assumed the risk of attempting personal service on an out-of-state corporation during a global pandemic, the district court did not abuse its discretion in rejecting the Association's impossibility/impracticability defense.

Equitable Tolling

The Association argues that the district court erred by declining to toll the limitation period when the circumstances causing the closure of PMA's office, which prevented timely personal service, were out of the Association's control.

A court may grant equitable relief by tolling a limitation period. *See Jones v. Consol. Freightways Corp.*, 364 N.W.2d 426, 429 (Minn. App. 1985) (applying this principle in context of Minn. Stat. § 363.14, subd. 1 (1974)). While the court must consider whether the defendant would be prejudiced by tolling, the conduct of the plaintiff is also

subject to scrutiny. *Ochs v. Streater, Inc.*, 568 N.W.2d 858, 860 (Minn. App. 1997). Generally, "innocent inadvertence" is not sufficient to toll a limitation period, but circumstances beyond the control of the plaintiff can provide a basis for equitable tolling. *Jones*, 365 N.W.2d at 429.

In declining to toll the limitation period here, the district court held that "service was not outside of [the Association's] control" because "service of a foreign insurance company via certified mail to the Commissioner of Commerce was always available to [the Association], even on the tight timeline they were working with." The Association argues that personal service "was the only method for service that would have allowed the Association to accomplish its goals of conserving judicial and party resources." It further argues that the district court's holding "would have essentially required the Association to simultaneously attempt both personal and substitute service, despite the fact that one of those selections results in unreasonable burdens the Association specifically sought to avoid." However, the district court's holding suggests no such obligation. Instead, it correctly recognizes that equitable tolling is inappropriate here because the Association always had the option of mailing the pleadings to the Commissioner to accomplish timely service, regardless of the permissive nature of that method.

The Association possessed all the information necessary to commence suit before the limitation period expired. And the fact that the Association reported the claim to PMA ten days before the Policy's deadline shows that it had ample time to perfect service in compliance with the Policy. The Association's "innocent inadvertence" is not sufficient to toll the limitation period, even though PMA would not suffer any prejudice. Accordingly,

the district court did not abuse its discretion in declining to toll the limitation period here, where the Association attempted to commence suit within the two-year limitation period but failed for reasons within its control. *See Ochs*, 568 N.W.2d at 860.

Because the record provides no basis for tolling the limitation period, and because the Association has offered no evidence that circumstances beyond its control prevented it from accomplishing service within the contractual period, the district court did not abuse its discretion in declining to toll the limitation period.

Equitable Estoppel

The Association argues that the doctrine of equitable estoppel should prevent PMA from asserting a time-limitation defense because PMA engaged in misrepresentation and concealment that prevented the Association from making timely service. The district court rejected this argument and declined to "accept that any 'misrepresentation or concealment' happened."

Equitable estoppel is "addressed to the discretion of the court and intended to prevent a party from taking unconscionable advantage of his own wrong by asserting his strict legal rights." *Nelson v. Comm'r of Revenue*, 822 N.W.2d 654, 660 (Minn. 2012) (quotation omitted). An insurer's conduct can estop the assertion of a time limitation contained in an insurance policy if the facts show that it would be "unjust, inequitable, or unconscionable to allow the defense to be interposed." *L & H Transport, Inc. v. Drew Agency, Inc.*, 403 N.W.2d 223, 227 (Minn. 1987) (citation omitted). The party invoking the equitable-estoppel doctrine must show that it reasonably and detrimentally relied on representations made by the other party. *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913,

919 (Minn. 1990). Estoppel is ordinarily a question for the jury, but "when only one inference can be drawn from the facts, the question is one of law," which can be addressed by the district court. *L & H Transport*, 403 N.W.2d at 227.

The Association argues that PMA should be estopped from asserting a time-limitation defense because PMA either misrepresented the address of its registered office for purposes of service or concealed the fact that its office was closed by not notifying the Association of the closure. However, the Association fails to allege any affirmative action by PMA that misled appellant as to whether its office was going to be open, and there is nothing in the record to indicate that any such misrepresentation or concealment occurred.

Because the record does not support the Association's assertion that PMA represented that its office was open or concealed the fact that its office was closed, the district court did not abuse its discretion in declining to apply equitable estoppel. *See W.H. Barber Co. v. McNamara-Vivant Contracting Co., Inc.*, 293 N.W.2d 351, 357 (Minn. 1979) (stating a "representation or concealment of material facts is an indispensable element of equitable estoppel").

In sum, the Association has failed to demonstrate that the district court abused its discretion in finding that the equitable doctrines of impracticability, equitable tolling, and equitable estoppel are inapplicable under the facts of this case.

Affirmed.